



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

CONCURRING OPINION IN ADVISORY OPINION 1988-47

of

COMMISSIONER SCOTT E. THOMAS

I concur with the Commission's decision in Advisory Opinion 1988-47, but write separately to address certain legal issues not explicated by the written opinion.

I. In AO 1988-47, the Commission found that "People & Politics, Inc.'s proposed gift of 2,000 copies of its magazine to [a candidate's campaign] would be a contribution under the Act and the regulations." AO 1988-47 at 2 (footnote omitted). Under 2 U.S.C. 441b, candidates and their political committees are prohibited from knowingly accepting or receiving illegal corporate contributions. Thus, the Commission concluded that "People & Politics, Inc., may not provide without charge 2,000 copies of its September 1988 issue to [the candidate's] campaign." AO 1988-47 at 3.

The Commission's opinion included a somewhat cryptic reference to two exemptions from the 441b prohibitions:

The Commission expresses no opinion about the possible application of other provisions of the Act and the regulations to the activities of People & Politics, Inc. See, e.g., Advisory Opinion 1987-8 (the 'news story' exemption) and 11 CFR 114.4(b)(5) (permitting the publication and distribution of qualified non-partisan voter guides to the general public). Advisory Opinion 1988-47 at 3 n.2.

Indirectly, of course, the Commission did express an opinion about the "news story" and "voter guide" exemptions because neither was applied. I believe that it is helpful to discuss these two exemptions in more detail than is found in footnote 2 of the Advisory Opinion.

A. The Act prohibits "any corporation whatever" from making a contribution or expenditure "in connection with" any federal election. 2 U.S.C. 441b. There is a statutory exemption, however, for certain activities by the communications media. Section 431(9)(B)(i) excludes from the definition of "expenditure":

any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such

facilities are owned or controlled by any political party, political committee, or candidate. 2 U.S.C. 431(9)(B)(i).

The media exemption accommodates the constitutional protection accorded the press function. The legislative history of 2 U.S.C. 431(9)(B)(i) indicates that Congress did not prohibit newspapers and periodicals, which were financed by subscription or advertisement, from publishing news stories, commentaries or editorials. The news story exemption, as it currently reads in 2 U.S.C. 431(9)(B)(i), was added to the Act in 1974. The House Report stated:

Clauses (A), (B) and (C) of subparagraph (4) underscore and reaffirm the principles stated in the amendment to section 610 of title 18, United States Code, proposed by Representative Orval Hansen, and passed by Congress as part of the Act. Those clauses make it plain that it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus, clause (A) [which became 2 U.S.C. 431(9)(B)(i)] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns. H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974).

Thus, expenditures incidental to carrying out the ordinary functions of the media are not "expenditures" within the meaning of the Act. On the other hand, the media exemption does not include those corporate expenditures outside the normal operation of newspapers or periodicals:

[I]n exempting the 'distribut[ion]' of news or commentary 'through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication . . .', the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function. It would not seem to exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function. If, for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers, this activity would not come within the press exemption. *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981). 1

B. Several factors would have to be present in order to conclude that the proposed distribution of People p Politics falls within 2 U.S.C. 431(9)(B)(i). For example, it would be necessary to determine that People & Politics is a "periodical publication." The Commission has construed this term to mean "a publication in bound pamphlet form appearing at regular intervals . . . containing articles of news, information, opinion or entertainment, whether of general or specialized interest which ordinarily derive[s] [its] revenues from subscriptions and advertising." AO 1980-109, 1 Fed. Elec. Camp. Fin. Guide (CCH), P5556 (Oct. 6, 1980), quoting Explanation and Justification of Regulations on Funding of Federal Candidate Debates, 44 Fed. Reg. 76735 (1979).

Secondly, the Commission would have to satisfy itself that People & Politics, Inc. is not owned or controlled by any political party, political committee, or candidate. Finally, the

Commission would have to decide whether the free distribution of People & Politics was akin to the normal business activity of a press entity. See *FEC v. Phillips Publishing*, 517 F.Supp. 1308, 1313 (D.D.C. 1981) (distribution of letter soliciting subscriptions) and *Reader's Digest Association v. FEC*, 509 F.Supp. 1210 (S.D.N.Y. 1981) (dissemination of publicity video tape) as discussed in *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 251 n.5 (1986).

While it appears that People & Politics is a "periodical publication" and that People & Politics, Inc. is not owned or controlled by a political party, political committee or candidate, there is a legitimate question as to whether the free distribution of 2,000 copies of the inaugural edition to a political candidate's workers is part of the normal business activity of a press entity. By way of contrast, the Commission has permitted a publisher of a weekly news periodical to provide up to ten complimentary copies of its compilation book about the various presidential primary candidates to the candidates involved. AO 1987-8, 1 Fed. Elec. Camp. Fin. Guide (CCH), P5890 (May 4, 1987). The Commission's limitation of ten complimentary copies, in my view, was based on the rationale that providing a larger number would be outside the publisher's normal business activity and would be placing in the hands of the candidate an asset sufficiently valuable to warrant regulation. A large quantity of a valuable publication containing articles that identify a candidate and state his or her positions on various issues could be distributed by such candidate in an effort to garner support or as a fundraising device. To provide such a large quantity to a candidate's agents would seem to go beyond normal promotional efforts. The Commission cannot profess to be an expert in deciding what may be effective business promotion. On the other hand, the Commission is charged by law with the responsibility of determining what is a contribution or expenditure in connection with a federal election. There were a myriad of other promotional options available to the publishers of People & Politics. Yet they were pursuing a method that gave every appearance of a gift of substantial monetary value to various political campaigns that no doubt could and would be used to the recipients' political benefit.

C. Commission regulations permit a corporation to prepare, and distribute to the general public, non-partisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. 11 CFR 114.4(b)(5)(i). The regulations set out several factors that the Commission may consider in determining if a voter guide is non-partisan:

(A) The questions are directed to all of the candidates for a particular seat or office, giving the candidates equal time to respond, except that in the case of Presidential and Vice Presidential candidates the questions may be directed only to those candidates seeking the nomination of a major party or to those appearing on the general election ballot in enough States to win a majority of the electoral votes;

(B) The voter guide reprints verbatim the responses of each candidate to whom questions were sent, without any additional comment, editing, or emphasis, although the sponsoring organization may impose limitations on the number of words per response when the questions are initially sent to the candidates for their comments;

- (C) The wording of the questions presented does not suggest or favor any position on the issues covered;
- (D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party;
- (E) The sponsor may ask each candidate to provide biographical information such as education, employment positions, offices held, and community involvement and may impose a limitation on the number of words per submission;
- (F) The voter guide is made available to the general public in the geographic area in which the sponsoring organization normally operates. 11 CFR 114.4(b)(5)(i)(A)-(F).

In my opinion, the inaugural issue of People & Politics would not qualify under the voter guide exemption since a number of the above-listed factors are not satisfied. For example, it appears that the questions were not sent to "all of the candidates for a particular seat or office." 11 CFR 114.4(b)(5)(i)(A). Rather, the questions were directed to only the Republican and Democratic candidates. Moreover, the description and discussion of the candidates contained in People & Politics goes well beyond the mere question and answer format contemplated by a non-partisan voter guide. In addition, providing the inaugural edition in bulk to the candidates' workers does not amount to "distribut[ing] to the general public." 11 CFR 114.4(b)(5)(i).

II. In sum, the Commission's opinion implicitly rejected application of the "news story" and "voter guide" allowances. In light of the circumstances--a gift of 2,000 informative, intrinsically-valuable, campaign-related magazines of obvious political worth to a candidate--the result seems obvious, perhaps. Nonetheless, with some adjustments in the manner of distribution and in the portions included in the text, much of what the publisher wished to accomplish probably could have been achieved under either of the cited exemptions. That question awaits another day.

1/18/89

1/ Likewise, the legislative history of the predecessor to 2 U.S.C. 441b indicates that the general prohibition on corporate expenditures was intended to apply to the corporate press except to the extent that the press entity was engaging in the normal operation of its newspaper or periodical: If the paper . . . is operated independently, if it derives its money from its subscribers, then of course there would be no violation. . . . They could not publish a special newspaper [in support of one candidate over another]. . . . None of us have ever assumed that the Corrupt Practices Act prevented a newspaper from writing editorials for or against any candidate. . . . If they are sold to subscribers and if the newspaper is supported by subscriptions, then I would not say that constituted such an expenditure. But if the newspaper were given away--even an ordinary newspaper--I think that would violate the Corrupt Practices Act. That act would be violated, it seems to me, if such a newspaper were given away as a political document in favor of a certain candidate. 93 Cong. Rec. 6436, 6437, 6438 (June 5, 1947) (colloquy between Sens. Taft and Barkley) (emphasis added).